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ASSOCIATION OF
AMERICAN RAILROADS

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April 12, 2011

Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

Re: Ex Parte No. 702, National Trails System Act and Railroad Rights-of-Way

Dear Ms. Brown:

Pursuant to the Board's Notice served February 16, 2011, attached please find the Comments of the Association of American Railroads ("AAR") for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot

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Attachment

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 702

NATIONAL TRAILS SYSTEM ACT AND RAILROAD RIGHTS-OF-WAY

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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Introduction

In a Notice of Proposed Rulemaking ("NPR") served February 16, 2011, the Board instituted a proceeding to clarify and update some of its existing regulations and procedures regarding the use of railroad rights-of-way for railbanking and interim trail use under Section 8 (d) of the National Trail Systems Act ("Trails Act"), 16 U.S.C. § 1247 (d). NPR at 1. The Board also proposed to add new rules to its regulations regarding the Trails Act (codified at 49 C.F.R. § 1152.29) that would (*inter alia*) impose certain additional procedural requirements on railroads and trail sponsors regarding the negotiation and termination of interim trail use agreements. *Id.* The Board requested comment on its proposed rules as well as on "how to resolve state sovereign immunity issues" pertaining to "the ability of some states to assume liability and legal and financial responsibility for a right-of-way during the interim trail use period." *Id.* at 1, 6. [1]

The Association of American Railroads ("AAR"), on behalf of its member railroads, submits these comments in response to the Board's February 16, 2011 NPR. The AAR generally concurs in the Board's proposals except for certain proposed modifications and clarifications as

[1] The Board's proposals arise out of the written and oral testimony submitted by parties in response to the Board's July 8, 2009 public hearing in Ex Parte No. 690, *Twenty-Five Years of Railbanking: A Review & Look Ahead* (STB served May 21, 2009). NPR at 2.

discussed in the AAR's comments. Specifically, the AAR believes that, because CITU/NITUs are self-executing and authorize a carrier to abandon any portion of the right-of-way not covered by an interim trail use agreement, it is unnecessary and procedurally burdensome for the Board to require the vacation and modification of original CITU/NITUs where an interim trail use agreement is negotiated for only a portion of the right-of-way proposed for abandonment. The AAR also responds to other specific issues raised by the Board in the NPR.

Background

I. Section 8(d) of the Trails Act: The Rails-to-Trails Provisions

In the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act")[2], Congress noted its concern about the loss of rail corridors through abandonments and its interest in preserving former rail corridors intact for future use. The 4-R Act attempted to address this concern through various provisions aimed at promoting the "banking" of these lines for potential future rail use and the interim conversion of abandoned lines to trails or other public uses.[3]

The provisions of the 4-R Act proved unsuccessful in achieving Congress' objectives. Because many railroad rights-of-way are not owned by the railroads in fee, but rather are easements pursuant to which the property reverts to the abutting landowner upon termination of rail use, Congress found that a principal obstacle was that once abandonment was authorized and implemented, state law reversionary rights precluded preservation of the former rail corridor by conversion to trail use.

The rails-to-trails act provisions were enacted in 1983 as amendments to the Trails Act to address the state law reversionary interest problem arising from approved abandonments. The rails-to-trails provisions addressed the problem by permitting rail carriers to negotiate voluntary

[2] Pub. L. 94-210, 90 stat. 144.
[3] See *Presault v. I.C.C.*, 494 U.S. 1, 6 (1990) ("*Presault*").

interim trail use agreements with entities prepared to assume financial and managerial responsibility and legal liability for the right-of-way. As a result, if the parties reach agreement, the land may be transferred to the trail operator for interim trail use; if no agreement is reached, the line may be abandoned by the carrier.

The interim trail use is subject to future reconversion of the corridor to rail use. Where there is agreement for interim trail use, the Trails Act expressly overrides any reversionary rights. [4]

II. The Board's Regulations Implementing the Trails Act Provisions

The Board's current regulations implementing the Trails Act provisions are intended to facilitate the voluntary negotiation of interim trail agreements between an abandoning carrier and a trail sponsor. They do so by minimizing procedural burdens and by recognizing the Board's essentially ministerial role in facilitating the negotiation process.[5]

Under the Board's implementing regulations, potential trail operators (and other interested parties) are provided public notice of abandonment and abandonment exemption proceedings through *Federal Register* notice, local newspaper publication and other means. The notice includes a statement inviting comment on prospective use of the right-of-way for interim trail use and rail banking.[6] Potential interim trail use sponsors interested in acquiring or using the line for interim trail use must file (within specified time periods)[7] a statement of willingness to

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[4] Under the Trails Act, rail carriers can transfer lines to interim trail sponsors by means of donation, lease, sale or otherwise. 16 U.S.C. 1247 (d). As provided by Section 8 (d) of the Trails Act, "such interim use shall not be treated, for purpose of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." Section 8(d) was upheld in *Presault* against constitutional challenge. The Court further found that a Tucker Act remedy was available for any reversionary property owner asserting a taking claim under Section 8 (d). *Presault*, 494 U.S. at 4-5, 11-12.

[5] See *Rail Abandonments –Use of Rights-of-Way as Trails*, 2 I.C.C. 2d 591, 605 (1986); *Policy Statement on Rails-to-Trails Conversions*, 1990 WL 287255 (I.C.C.) *3-4 (February 6, 1990).

[6] See 49 U.S.C. §10903(a) (3) (c); 49 C.F.R. §§ 1105.12, 1152.20; 49 C.F.R. §1152.21 (5) (vi).

[7] See 49 C.F.R. §§1152.29 (b) (1)-(2) (within the 30-day comment period in regulated abandonments and within 10 days after *Federal Register* notice in exemption proceedings).

assume financial and managerial responsibility for the right-of-way proposed to be acquired. The statement must include an acknowledgement that the line is subject to possible future reconstruction and reactivation for rail service. [8]

At that point, the role of the Board is to "determine whether the Trails Act is applicable," i.e., that the potential trail user has complied with the procedural requirements of 49 C.F.R. §1152.29 and has executed a statement of willingness to assume financial and managerial responsibility.[9] If so, the Board requests the carrier to state whether it intends to negotiate an interim trail use agreement.[10] If the carrier is willing, the Board issues a Certificate of Interim Trail Use or Abandonment (CITU) (in an abandonment proceeding) or a Notice of Interim Trail Use or Abandonment (NITU) (in an exemption case) to allow the parties time to negotiate an interim trail use agreement. A CITU or NITU provides a 180-day period during which the railroad may discontinue service, cancel tariffs, and salvage the track and other equipment, and also negotiate a voluntary agreement for interim trail use.[11] If the parties are unable to reach a trail use agreement, the CITU or NITU automatically converts into an effective certificate or notice of abandonment. If the parties reach a trail use agreement, the CITU or NITU automatically authorizes the interim trail use. The interim trail use is subject to future reactivation of the right-of-way for rail service.[12]

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[8] 49 C.F.R. §1152.29 (a).
[9] See *Rail Abandonments –Use of Rights-of-Way as Trails*, 4 I.C.C. 2d 152, 156 (1987); *Policy Statement on Rails-to-Trails Conversions*, 1990 WL 287255 (I.C.C.) *3 (February 6, 1990).
[10] The railroad's reply is due within 10 days after the Board issues a Notice of Findings in a regulated abandonment proceeding and within 10 days after the interim trail use request is filed in an exemption proceeding. 49 C.F.R. § 1152.29 (b) (5).
[11] 49 C.F.R. §§1152.29 (c)-(d). The 180-day period may be extended by voluntary agreement. *Birt v. STB*, 90 F. 3d 580, 588-90 (D.C. Cir. 1996).
[12] 49 C.F.R. §1152.29(c)-(d).

As the Board has expressly found (with judicial approval), its role in implementing the Trails Act provisions is ministerial.[13] The Board has no power to compel a conversion between unwilling parties, and conversely, no discretion to refuse one if voluntarily negotiated. [14] The Board also does not determine whether rail banking and interim trail use is desirable for a particular line,[15] nor rule on whether a private organization that has filed a statement of willingness to assume financial and managerial responsibility for a right-of-way for interim trail use is "fit" to serve as a trail sponsor.[16] The Board also does not analyze, approve, or set the terms of the interim trail use arrangement or regulate activities over the trail (which are generally subject to state law).[17] After a voluntary trail use agreement is reached, the Board has authority to revoke a trail condition only if it is shown that the Trails Act statutory requirements (the rail banking, liability, and trail management obligations) are not being met.[18] As required under the

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[13] See *Rail Abandonments –Use of Rights-of-Way as Trails*, 2 I.C.C. 2d 591 (1986); *Policy Statement on Rails-to-Trails Conversions*, 1990 WL 287255 (I.C.C.) *3 (February 6, 1990); Finance Docket No. 32609, *Chesapeake Railroad Company—Certificate of Interim Trail Use and Termination of Modified Rail Certificate* (served February 24, 2011) ("*Chesapeake Railroad*"); *Nat'l Wildlife Federation v. Interstate Commerce Comm'n*, 850 F. 2d 694, 698-702 (D.C. Cir. 1988) ("*Nat'l Wildlife*"); *Citizens Against Rails-to-Trails v. STB*, 267 F. 3d 1144, 1149-50 (D.C. Cir. 2001) ("*CART*").

[14] See, e.g., Docket No. AB-167 (Sub-No. 1094)A, *Chelsea Property Owners—Abandonment—Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY* (June 10, 2005), slip op. at 6-7 ("*Chelsea*"); *Iowa Southern R. Co.—Exemption-Abandonment*, 5 I.C.C. 2d 496, 504 (1989) ("*Iowa Southern*"), *aff'd sub nom, Goos v. I.C.C.*, 911 F.2d 1283, 1293-1296 (8th Cir. 1990) ("*Goos*"); *Nat'l Wildlife*, supra;); *Washington State Dept. of Game, v. ICC*, 829 F. 2d 877, 881-882 (9th Cir. 1987).

[15] See, e.g., *Iowa Southern*, 5 I.C.C. 2d at 504 ("We lack any discretion to decide whether rail banking and use of the right-of-way as a trail is desirable for a particular line; Congress has made that determination...."); *Chelsea*, slip op. at 6.

[16] The Board leaves the fitness issue to the judgment of the rail carrier whose economic interests are at stake and applies a rebuttable presumption that carrier willingness to enter into a trail use agreement is sufficient proof of a trail sponsor's fitness. See, e.g., *Jost v. ICC*, 194 F.3d 79 (D.C. Cir. 1999); *Policy Statement on Rails-to-Trails Conversions*, 1990 WL 287255 (I.C.C.) *3.

[17] See *Policy Statement on Rails-to-Trails Conversions*, 1990 WL 287255 *3;); Docket No. AB-389 (Sub-No. 1X), *Georgia Great Southern Division, South Carolina Central Railroad Co., Inc.—Abandonment and Continuance Exemption—Between Albany and Dawson, In Terrell, Lee, and Dougherty Counties, GA (served June 10, 2005)* ("*Georgia Great Southern*"), slip op. at 6-7; *Chelsea*, slip op. at 6-7.

[18] 49 C.F.R. 1152.29 (a) (3); See *Rail Abandonments –Use of Rights-of-Way as Trails*, 2 I.C.C. 2d 591 (1986); *Georgia Great Southern*, slip op. at 6-7. If a trail sponsor intends to terminate interim trail use it must request that the CITU/NITU be vacated on a specified date. 49 C.F.R. §§ 1152.29 (c) (2), (d) (2). The railroad, if it does not wish to reinstate service (or continue to retain the line for future use), may then petition to reopen the abandonment or exemption proceeding and obtain full abandonment authority. Interim trail use arrangements are also subject to substitution of trail sponsors. 49 C.F.R. §1152.29(f).

Trails Act, an interim trail use arrangement is subject to being cut off at any time by the reinstitution of rail service.[19]

Discussion

The AAR's comments on the specific proposals made by the Board in the NPR for clarification or modification of its current rules are set forth below *seriatim.*

I. Clarification of the Board's Existing Rules and Procedures

A. Requesting an Extension of Time for Filing a Notice of Abandonment Consummation

The Board noted that its current rules at 49 C.F.R. § 1152.29 (e) require railroads to file a notice of consummation of abandonment of a rail line. NPR at 5. The rules specify that, if a rail carrier fails to file a notice of consummation within 1 year of the date of service of a decision permitting abandonment, then, absent some legal or regulatory barrier to consummation (such as an historic preservation condition under section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f, or a CITU/NITU), the authority to abandon will automatically expire. 49 C.F.R. § 1152.29(e)(2). The Board's rules also allow a railroad to file a request for an extension of time to file a notice of consummation for good cause shown. *Id.*

In the NPR, the Board clarified that "there is no need [for a carrier] to file a request to extend the time for filing [the notice of consummation] when legal or regulatory conditions (including a

[19] See, e.g., *Georgia Great Southern*, slip op. *at 4 (*May 9, 2003) ("If and when the railroad wishes to restore rail service on all or part of its property; it has the right to do so, and the trail user must step aside."); *Birt v STB*, 90 F. 3d at 583. With the consent of the original abandoning carrier, the right to reinstitute service (along with the abandoning carrier's residual common carrier obligation over the right-of-way) may be transferred to a third party subject to Board approval of the transfer of operating authority. *See Iowa Power, Inc.—Construction Exemption—Council Bluffs, IA*, 8 I.C.C. 2d 858 (1990); AB -3 (Sub-No. 104X), *Missouri Pacific Railroad Company—Abandonment Exemption—In Muskogee, McIntosh and Haskell Counties, OK* (May 11, 2009), slip op. at 1); *N&W-Aban. St. Mary's & Minister in Auglaize County, OH*, 9 I.C.C. 2d 1015, 1018-1019 (1993) ("*N&W*"). The abandoning carrier may also withdraw from a CITU/NITU should it wish to consummate the abandonment. See *N&W* at 1019.

CITU/NITU) remain in effect that bar consummation of abandonment until these conditions have been satisfied or removed." NPR at 5. As explained by the Board:

> Under our notice-of-consummation rule, the rail carrier has 60 days from the date of satisfaction, expiration, or removal of the legal or regulatory barrier to consummation in which to file a notice of consummation. 49 C.F.R. § 1152.29(e)(2). Thus, when historic preservation (or other imposed conditions that do not relate to salvage) have not yet been satisfied, there is no need for a rail carrier to request an extension of the 1-year notice-of-consummation requirement just to ensure that the abandonment authority will not expire.

NPR at 5-6.

The AAR concurs in the Board's clarification that there is no need for a carrier to file a request to extend the time for filing the notice of consummation when legal or regulatory conditions (including a CITU/NITU) remain in effect that bar consummation of abandonment. The AAR agrees that the Board's current notice-of-consummation rule (49 C.F.R. § 1152.29(e)(2)) adequately addresses such circumstances.

B. State Sovereign Immunity Issues

The Board noted that "Congress has imposed a requirement in the Trails Act that states and political subdivisions, as well as qualified private organizations, 'assume responsibility for . . . any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied against such rights-of-way'." NPR at 6. See 16 U.S.C. § 1247(d); see also *Citizens Against Rails-to-Trails v. STB*, 267 F. 3d 1144, 1149 (D.C. Cir. 2001) ("*CART*"). The Board further noted that, "[a]lthough the Trails Act thus expressly contemplates that states and political subdivisions may be trail sponsors, it does not directly address the fact that many states have some form of legal immunity from liability." *Id.* To address this gap, the Board noted that its "current rules permit an entity with legal immunity to serve as a trail sponsor if it agrees

to indemnify the railroad against any potential liability." NPR at 6; see 49 C.F.R. § § 1152.29 (a) (2).[20]

Notwithstanding the Board's specific indemnification alternative to the statutory "assumption of liability" requirement, the NPR noted that, "[i]n individual cases, some state entity trail sponsors have argued, based on their particular state laws, that they need to qualify their statements of willingness to indemnify the railroad." *Id.* The Board accordingly requested comment "on what, if any, change in our Trails Act rules could accommodate these concerns, given the plain language of 16 U.S.C. § 1247(d)." *Id.*

The AAR concurs in the Board's view that the "plain language" of 16 U.S.C. § 1247(d) governs the issue and is opposed to any change in the Board's rules that would permit a state entity to qualify its statement of willingness to indemnify the railroad as part of a request for interim trail use. A qualified statement of willingness fails to comply with the statute and implementing regulations of the Board and cannot be used to support interim trail use requests by state entities.

As noted in the NPR, the provisions of 16 U.S.C. § 1247 (d) expressly require that a trail sponsor "assume responsibility for . . . any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied against such rights-of-way." Full assumption of liability by the trail sponsor is thus expressly required by the underlying statute. Although the Board may have the authority to determine (in adoption of 49 C.F.R. § 1152.29 (a) (2)) that an indemnification requirement (applicable to a trail sponsor that is otherwise immune from liability) is the equivalent to an assumption of liability and thus meets

[20] See also 49 C.F.R. § 1152.29 (a) (3) (requiring a trail sponsor to submit in a specific form a Statement of Willingness to Assume Financial Responsibility (as set forth in the regulation) that requires a trail sponsor that is immune from liability to enter into a specific commitment to "indemnify the railroad against any potential liability").

this requirement, it has no authority to qualify or reduce the full level of assumption of liability that the statute requires. Indeed, in its recent decision in Finance Docket No. 32609, *Chesapeake Railroad Company—Certificate of Interim Trail Use and Termination of Modified Rail Certificate* (served February 24, 2011) ("*Chesapeake Railroad*") the Board confirmed such straight-forward construction of the law. The Board expressly found that a qualified statement of willingness to assume financial responsibility filed by a state entity as part of its request for interim trail use "failed to meet the applicable statutory and regulatory requirements." Slip Opinion at 1. The AAR fully supports the Board's *Chesapeake Railroad* decision.

The AAR would further note that the "assumption of liability" issue can be readily addressed by the states themselves and that there is no need for the Board to change its Trails Act rules in any respect. If a state wishes to participate in the railbanking program, it can simply pass legislation which authorizes its agencies (or other state entities) to accept full liability (or agree to indemnification) in transactions under the Trails Act. The AAR also concurs in the other options noted by the Board in the NPR that would allow the states to accommodate their interests in the creation of recreational trails through: (1) designation of a financially-responsible non-state entity to be the trail sponsor or (2) acquisition of the railroad right-of-way property to be abandoned outside of the Trails Act framework. As explained by the Board:

> We note that states interested in further railbanking have the option to revise their sovereign immunity laws to accommodate the Trails Act, or could designate trail sponsors other than the state itself who would not be limited by the state sovereign immunity laws. State entities also have the ability to acquire railroad rights-of-way for use as recreational trails outside the framework of the Trails Act, either through negotiations with the railroad after the line has been abandoned or through their power of eminent domain if it authorizes the state to acquire the necessary property interests on lines that have been abandoned. See e.g., *Consol. Rail Corp.—Aban. Exemption—in Lancaster & Chester Cntys., Pa.*, AB 167 (Sub-No. 1095X), slip op. at 4 (STB served Jan. 19, 2005).

NPR at 6.

C. Reactivation of Rail Lines and Compensation Issues.

The NPR noted that issues involving the reactivation of active rail service on railbanked lines have been addressed by the Board in various individual proceedings and that "[t]he Board will not revisit or expand on any of the analysis set forth in those decisions at this time." NPR at 6-7. The NPR also noted that "[i]ssues such as who should bear the cost to restore rail service are best addressed as they arise in the context of an individual case." *Id.*

The AAR concurs in the Board's position on these issues as set forth in the NPR.

D. Actual Notice to Landowners

The NPR noted that, following the Board's July 8, 2009 public hearing on the railbanking program, the National Association of Reversionary Property Owners ("NARPO") submitted a proposed rule to the Board which would have the Board require the railroad to give direct notice via mail to adjoining landowners following the issuance of a CITU or NITU. The direct notice, NARPO alleged, was required by due process so that adjoining property owners might not inadvertently lose their right to file a compensation claim under the Tucker Act, 28 U.S.C. § 2501, within the six-year statute of limitations (which begins to run at the time the CITU/NITU is issued) because they were unaware that the right-of-way was potentially subject to interim trail use. NPR at 7.

The NPR, however, further explained that "[t]he Board and its predecessor, the ICC, previously declined to adopt an actual notice rule, finding that actual notice would be time-consuming, burdensome, and unnecessary. *Nat'l Ass'n of Reversionary Property Owners v. STB*, 158 F.3d 135 (D.C. Cir. 1998); see *Rail Abans.—Use of Rights-of-Way as Trails—Supplemental*

Trails Act Procedures, EP 274 (Sub-No. 13) (ICC served July 28, 1994)."[21] The NPR also noted that the "agency has explained that interested parties may contact either the railroad or trail sponsor to find out whether the railroad has consummated abandonment or obtain information on the status of any interim trail use negotiations. Because local public hearings on trail proposals are 'the norm rather than the exception,' property owners have the opportunity to learn who is acquiring and operating a trail 'in virtually every case'. *Rail Abans.—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures*, EP 274 (Sub-No. 13) (ICC served May 26, 1989). The Board, accordingly, did not reopen its previous decisions declining to require that actual notice be provided to adjoining landowners. As found by the Board:

> We continue to believe that actual notice to individual landowners is not practical. Accordingly, we do not propose to adopt NARPO's suggested approach here. Moreover, we also believe that our proposed rule requiring railroads to notify the Board when a trail use agreement has been reached will give landowners more information about the status of lines eligible for railbanking.

NPR at 8. The AAR supported the Board's and the ICC's prior decisions declining to impose a requirement that actual notice be provided to adjoining landowners for the reasons explained by the Board in the NPR and concurs in the Board's decision not to reopen its prior decisions.

The NPR, however, did request comments "on whether the current method of newspaper notice can be augmented by additional methods of indirect notification that take advantage of advances in technology but do not create an undue burden on rail carriers." *Id.*

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[21] The NPR also noted that: "[w]hen a rail carrier intends to abandon a line, it must provide notice to appropriate federal, state and local agencies, government entities, and local communities. 49 C.F.R. §§ 1152.20(a)(2), 1152.50(d), and 1152.60(d); see also 49 C.F.R. § 1105.7(b). In every abandonment case where an exemption from the requirements of 49 U.S.C. § 10903 is sought under 49 U.S.C. § 10502, the railroad must certify that it has published in a newspaper of general circulation in each county through which the line passes a notice that alerts the public to the proposed abandonment, to available reuse alternatives including the Trails Act, and to how it may participate in the Board proceeding. 49 C.F.R. § 1105.12. *Federal Register* notice [and newspaper notice] also is provided in every abandonment case. 49 C.F.R. §§ 1152.22(i), 1152.50(d)(3), 1152.60(c)." NPR at 7 & n.7.

In response to the Board's inquiry regarding the potential for "additional methods of indirect notification that take advantage of advances in technology," the AAR believes that the Board's electronic website *currently* provides a ready additional means of providing indirect notice to adjoining landowners of the status of interim trail use requests on lines proposed for abandonment. Under its current procedures, the Board publishes all Board proceedings (including abandonment and abandonment exemption proceedings) on its readily-accessible public website in addition to *Federal Register* publication and the other forms of notice required under its abandonment rules. An adjoining landowner, by simply accessing the Board's website, may thus be fully informed of any abandonment proceeding potentially affecting its interests, including requests for interim trail use.

Moreover, as noted by the Board, supra (NPR at 8), under one of the Board's proposed rules in this proceeding (which the AAR supports as discussed infra at 14-15) the railroads and trail sponsors would be required to notify the Board when a trail use agreement has been reached regarding a line proposed for abandonment. The AAR proposes that the Board also post such notice on its website. By posting such railroad/trail sponsor notification on its website, the Board would provide adjoining landowners with additional publicly-available notice that the line at issue is subject to an interim trail use agreement.

E. Clarification and Updating of Language in § 1152.29

In the NPR, the Board proposed minor language modifications to the current rules to conform more closely to the Trails Act and for other clarification purposes. NPR at 8. The proposed rules would also clarify that "the Board will issue a CITU/NITU for the portion of the right-of-way that both parties are willing to negotiate interim trail use on, rather than the portion 'to be covered by the agreement,' as what the agreement may ultimately cover is unknown at that

time." *Id.* The Board also proposed language modifications to the existing rules "to make clear that a trail sponsor may choose to terminate interim trail use over only a portion of the right-of-way covered by the trail use agreement, while continuing interim trail use over the remaining portion of the right-of-way covered by the trail use agreement." *Id.*

The AAR has no objection to the above NPR proposals.

II. Specific Proposed Rules

In the NPR, the Board proposed four specific rules that the AAR will also address *seriatim.*

A. Notice of Trail Use Agreements

As the Board noted, its current rules provide "no formal means of determining whether an actual interim trail use agreement is reached after the issuance of a CITU or NITU, and, if so, whether the agreement applies to the entire right-of-way at issue." NPR at 9. The Board further noted that "several parties at the hearing noted the difficulty in determining the status of lines authorized for abandonment after CITUs/NITUs are issued" because CITU/NITUs are self-executing and either result in an interim trail use agreement (if the trail use negotiations are successful for all or part of the line proposed for abandonment) or an abandonment of all or part of the right-of-way (if the trail use negotiations are unsuccessful or do not include the entire right-of-way). See NPR at 8.

The NPR accordingly proposed to require parties to notify the Board when an interim trail use agreement has been reached and to require the submission of a map and specific description, by milepost marker, of the right-of-way covered by the trail use agreement. *Id.* As noted by the Board, "The notice, which would be filed jointly by the railroad and the trail

sponsor, would ensure that the agency and the public have accurate information on the status of property where a CITU/NITU has been issued." *Id.*[22]

The AAR concurs in the Board's proposal and believes it will provide useful information to the Board and the public as to the status of the CITU/NITU and the specific portion of the right-of-way covered under the CITU/NITU.

B. Need to Petition the Board to Modify or Vacate a CITU/NITU

In the NPR, the Board noted the circumstances under existing rules where CITU/NITUs are required to be vacated or modified after issuance.[23] The NPR noted, however, that "[w]hen an interim trail use/railbanking agreement covers only a portion of the right-of-way that was proposed to be abandoned, the Board's regulations are unclear whether the CITU/NITU that was issued for the right-of-way could nonetheless continue in effect indefinitely, precluding the abandonment of the remainder of the right-of-way for which the CITU/NITU was issued." *Id.* The NPR accordingly proposed a new rule that would clarify that "if a trail sponsor and rail carrier reach an interim trail use agreement that applies to less of the right-of-way than is covered by the CITU/NITU, the notice of trail use agreement...must also include: (1) a request to vacate the CITU/NITU, thus permitting abandonment of the portion of the right-of-way not subject to the interim trail use agreement; and (2) a request for a replacement CITU/NITU that covers only the portion of the right-of-way subject to the interim trail use agreement." *Id.*

The AAR does have concern with the Board's proposed requirements that the original CITU/NITU be vacated and a replacement CITU/NITU be issued if the rail carrier and the trail

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[22] The NPR declined to propose that the specific interim trail use agreements be filed with the Board as requested by certain parties at the hearing. As noted by the Board, "These private agreements may contain commercially sensitive terms, and the Board does not administer or supervise the agreements." *Id.*

[23] As noted in the NPR, "[t]he Board's Trails Act rules make CITU/NITUs self-executing, and the rules contemplate that petitions to vacate or modify the CITU/NITU will be filed if rail service is to be reactivated, interim trail use ceases in whole or in part, or there is a change in trail sponsors." NPR at 9.

sponsor enter into an interim trail use agreement that includes only a portion of the right-of-way included in the original CITU/NITU. The AAR believes that the proposal is unnecessarily cumbersome, adds an unnecessary procedural burden to the interim trail use negotiation/abandonment process, and fails to reflect the fully self-executing nature of the CITU/NITU under the current statutory and regulatory scheme. Moreover, as discussed below, the notice of trail use agreement proposed by the Board would fully address the Board's need for clarity regarding the identification of the portion of the right-of-way that the carrier is authorized (and actually intends) to abandon under the original CITU/NITU.

The AAR notes that under the Board's existing rules, a CITU/NITU is self-executing and, as such, not only authorizes interim trail use for that portion of a line covered by an interim trail use agreement, but also authorizes full abandonment of the right-of-way if a trail use agreement is not reached within the applicable 180 day negotiation period (as may be extended by the Board on application of the parties). See NPR at 8. Because the CITU/NITU is self-executing, if a trail use agreement is reached for only part of the line covered by a CITU/NITU, there should be *no need* for further Board action before the carrier may exercise its right to fully abandon the portion of the line that is *not* included in the interim trail use agreement once the negotiation period has expired. The Board does not require the "vacating" of a CITU/NITU where the parties fail to negotiate an interim trail use agreement for the full right-of-way, and it is unnecessary for the Board to do so under circumstances where an interim trail use agreement is negotiated for only a portion of the right-of-way.

Moreover, the Board's proposed rule requiring the rail carrier and trail sponsor to notify the Board when a trail use agreement is negotiated and to specifically identify the portion of the right-of-way covered by the agreement is fully sufficient to inform the Board and interested

parties as to that portion of the right-of-way for which no interim trail use agreement has been reached and for which the carrier intends to exercise its abandonment authorization. The Board will thus know what segment of the right-of-way is covered by a "partial" trail use agreement when it receives the notice of trail use agreement as proposed in the NPR, and no further Board action with respect to "vacating" the original CITU/NITU and issuing a "replacement" CITU/NITU is necessary or warranted.[24]

C. Substitute Sponsor Requirements

The NPR also proposed to clarify the substitute sponsor requirements. As noted by the Board, the current rules (49 C.F.R. § 1152.29 (f) (1)) require that, "when a trail sponsor intends to terminate trail use and another person intends to become the trail sponsor, the substitute trail sponsor must acknowledge its willingness to assume financial responsibility for the right-of-way; but the rules are silent with regard to any acknowledgment that continued interim trail use remains subject to possible rail service restoration." NPR at 9. The Board accordingly clarified "that the substitute trail sponsor (like § 1152.29(a) (3)) requires of the original trail sponsor) must affirmatively acknowledge that the continued interim trail use is subject to possible future restoration of the right-of-way and reactivation of rail service." *Id.*

The AAR concurs in the Board's clarification as necessary to implement the requirements of the existing statutory and regulatory scheme underlying the interim trail use program.

[24] Consistent with the existing rules, the AAR believes that a request to vacate a CITU/NITU where only a "partial" trail use agreement is under negotiation and for issuance of a replacement CITU/NITU should only be required where the railroad seeks to abandon the non-agreement segment of the right-of-way prior to the expiration of the negotiation period applicable to the original CITU/NITU.

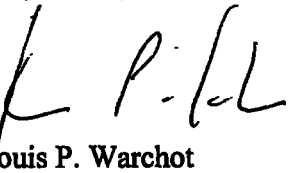
D. Applicability

In the NPR, the Board proposed to make the new rules applicable both to new CITUs/NITUs and cases where the CITU/NITU negotiating period has not yet expired when the rules become effective. The AAR concurs in the Board's proposal.

Conclusion

The Board should adopt the rules proposed in the NPR as modified by the AAR's proposals.

Respectfully Submitted,



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